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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 25

THE UNITED STATES OF AMERICA,
Appellant,

vs.

JACOB TROY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

STATEMENT OPPOSING JURISDICTION, AND MOTION TO DISMISS.

JOSEPH F. GUNSTER,
A. M. LUCKS,
R. L. LEVY,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. 985

THE UNITED STATES OF AMERICA,

Appellant,

vs.

JACOB TROY.

STATEMENT OF APPELLEE DISCLOSING MATTERS AND GROUNDS MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT UPON THIS APPEAL.

The offense for which the defendant was indicted is as follows:

> "Any person required under this title to collect, account for, and pay over any tax imposed by this title, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution. (*c*). The term 'person' as used in

this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs."

Section 146 (*b*) Act of 1928, C. 852, 45 Stat. 791.

The defendant falls within Section (*c*), he having been indicted as president of the corporation.

Under Section (*c*), to bring him within the designated class of persons who can commit this offense, it is necessary to aver that the alleged violation is an act which defendant is "under a duty to perform", in his office capacity.

Several acts are charged against the defendant, but nowhere in the indictment does it appear that there was a legal duty either statutory or one imposed upon him by virtue of his office under the by-laws of the corporation.

Thus there is a failure in the indictment to charge one of the jurisdictional facts necessary to make out the offense within the definition as laid down by the Act of Congress.

The court in holding that the indictment failed to plead the necessary facts which were component parts of the offense, did not in any manner construe the Act of Congress, but, on the contrary, limited the opinion to a construction of the indictment, and in so doing necessarily arrived at the conclusion that the indictment was defective in this respect.

All of which is respectfully submitted.

A. M. Lucks,
R. L. Levy,
Attorneys for Appellee.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 8695. June Term, 1933.

UNITED STATES OF AMERICA,

Appellant,

vs.

JACOB TROY,

Appellee.

Now, March 26, 1934, Jacob Troy, appellee, appears by his counsel, A. M. Lucks and R. L. Levy, and moves as follows:

First. That the appeal be dismissed, and assigns the following reasons:

(*a*) This appeal is not within the jurisdiction of the Supreme Court of the United States.

(*b*) The opinion filed by the District Court wherein is made absolute a rule to quash the indictment, does not construe Section 146 of the Revenue Act of 1928, c. 852, 45 Stat. 791 (the statute upon which the indictment was founded).

(*c*) The opinion construes the indictment, but does not construe the Act of Congress.

(*d*) The opinion of the court holds that the indictment as drawn is faulty, in that it does not set forth the jurisdictional facts necessary to establish the offense as defined by the Act of Congress.

A. M. LUCKS,
R. L. LEVY,
Attorneys for Appellee.